It is also important to note that the Courts of Judicature Act 1964 at paragraph 1 in the schedule provides that when dealing with prerogative writs the High Court has the power to issue any directions or orders for any purpose. It is therefore clear that the High Court when issuing an order of *certiorari* has the power to order a retrial of the matter in the Industrial Court on specified issues, in the nature of a mandamus and by way of proper directions.

Thus, consequentially this Court further orders that this matter be remitted back and be heard by another division of the Industrial Court on the substantial merits of the case.

As the first respondent cannot be held responsible for this impugned state of affairs, there shall be no order as to costs. It is hoped that this matter is taken up on appeal if only with the view to development of the law.

MD. ZAINUDDIN B. MD. DARUS & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL APPEAL NO. 52-191-92]
31 DECEMBER 1993

CORRUPTION: Appellants convicted for offence under s. 3(a)(i) Prevention of Corruption Act 1961 - Trap witness - Requirement for independent corroboration - Tape recorders - Conversation of complainant and both appellants recorded by tape recorders - Failure to introduce tape recorders - Section 114(g) Evidence Act 1950 - Whether adverse inference should be invoked against prosecution - Whether order of a re-trial justified.

EVIDENCE: Adverse inference - Section 114(g) Evidence Act 1950 - Tape recorders recorded conversation between complainant and accused persons in corruption case - Tape recorders in possession or power of prosecution - Withholding of evidence - Whether adverse inference should be invoked against prosecution for failure to produce tape recorders.

This was an appeal by the appellants against their conviction and sentence for an offence under s. 3(a)(i) of the Prevention of Corruption Act 1961 read with s. 34 of the Penal Code. The appellants were each sentenced to one day's imprisonment and fined RM2,000 in default six (6) months' imprisonment. Hence this appeal.

Held:

[1] In the present appeal, the two tape recorders would surely shed light as to what actually transpired at the JPJ office and at the Court premises. The two tape recorders were in the possession or power of the prosecution and they saw it fit to withhold it.

[2] It would not be incorrect to say that the contents of the two tape recorders could, of course, have been of vital importance because had it recorded the entire conversation between the first appellant and the complainant at the JPJ office and between the second appellant and the complainant at the Court premises, it would have been overwhelming corroboration of the complainant's version of the conversation given by both the accused persons.

[3] The conviction and sentence of both the appellants was set aside, accordingly, the fines, if paid, were ordered to be refunded.

[4] As both the appellants have suffered undue torment and mental anguish since 28 July 1987, there was no order of a re-trial.

[Appeal allowed. Conviction and sentence set aside. No order of a re-trial].

Cases referred to:
Mahabir Singh v. Rohini Ramanadhwaj Prasad Singh [1983] AIR PC 87 ***(refd)***
Jag Prasad Rai & Anor. v. Mt. Singari [1925] AIR PC 93 ***(refd)***
Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors. [1968] AIR SC 1413 ***(refd)***
Devidas v. Surishailappa [1961] SC 1277 (V 48 C 231) ***(cit)***
Mohd. Shafi & Anor. v. State of Jammu & Kashmir [1970] AIR SC 688 (V 57 C 138) ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Penal Code, s. 34
Prevention of Corruption Act 1961, s. 3(a)(i)
Road Traffic Ordinance

For the appellants - Lal Harcharan Singh; M/s. L.H. Singh & Co.
For the respondent - Masri bin Mohd. Daud, DPP

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
Both the accused were convicted on the following joint charge:

> That you jointly on 28 July 1987 at about 9.00 a.m. at the Sessions/Magistrate's Courts premises, Taiping, in the district of Larut, Matang and Selama, in the State of Perak, in furtherance of a common intention of both of you, did corruptly receive for yourselves a gratification to wit, RM50 from one Yeong Chong Yong, as an inducement for doing an act in respect of a matter proposed to take place, to wit, to assist the said Yeong Chong Yong to settle an alleged offence committed by the said Yeong Chong Yong under the Road Traffic Ordinance, of failing to conform to an indication of a traffic light at Jalan Kota, Taiping on 20 July 1987 and that you have thereby committed an offence punishable under s. 3(a)(i) of the Prevention of Corruption Act 1961 read with s. 34 of the Penal Code (FMS Cap. 45).

Each of the appellants was sentenced to one day's imprisonment and fined RM2,000 in default six (6) months' imprisonment. Against that conviction and sentence, they have now appealed.

I have scrutinised the appeal record with a fine-tooth comb and found an alarming failure on the part of the Sessions Judge in not taking into account the role of the complainant as a trap witness and, consequently, the need for an independent corroboration to ground the convictions against both the appellants.

There were two events that took place in the present appeal. One, the various meetings between the complainant and the first appellant at the JPJ office which culminated in the arrest of the first appellant. The other, the trap that was laid for the second appellant that resulted in the arrest of the second appellant with the marked notes in the Court premises.

The trap at the JPJ office for the first appellant was abortive as the first appellant refused to accept the money and suggested to pass it to his wife, the second appellant, at the Court premises.

On both occasions, the complainant was provided with tape recorders. There was evidence that the confrontation at JPJ office between the complainant and the first appellant, witnessed by the BPR lady officer who doubled up as the complainant's sister, to the effect that the tape recorder was switched on. Though the BPR lady officer was there, she did not hear the conversation between the complainant and the first appellant. Consequently, to corroborate the version of the complainant, a trap witness, the tape recorder would certainly come in handy.

Again, in the context of the meeting between the complainant and the second appellant at the Court premises, the same BPR lady officer tagged along. Unfortunately, the conversation between the complainant and the second appellant which resulted in the passing of marked notes, though recorded by the tape recorder, was not heard at all by that BPR lady officer. This is quite understandable because that BPR lady officer stood some 10 feet away from them. It would be germane to mention that there was evidence during cross-examination that the complainant was merely handing over a letter to the second appellant and that there was no mention at all about the money. Nor was there evidence that the second appellant had solicited money from the complainant.

Briefly, the first appellant in his defence, denied soliciting money from the complainant and adverted to the conversation which he had with the complainant in his office that fateful morning. During this encounter, the first appellant denied soliciting nor receiving any money from the complainant and refused to accept the envelope. Likewise, the second appellant in her defence, adverted to the conversation which she had with the complainant at the Court premises wherein she thought that the envelope contained a letter from the complainant pleading guilty to an offence. She thought that the complainant had been charged.

Thus, central to the case would be the conversations between the parties at JPJ office and at the Court premises.

A concerted attack was made by Mr. Lal Harcharan Singh, Counsel for both appellants, that s. 114(g) of the Evidence Act should be invoked against the prosecution for the blatant failure on their part to introduce the two tape recorders, cogent and potent corroborative evidence for the complainant. Encik Masri bin Mohd. Daud, the Deputy Public Prosecutor, argued strenuously to the contrary.

The suppression of useful evidence naturally leads to the inference that the evidence if produced would go against the party who withholds it. The *maxim: omnia praesumuntur contra spoliatorem* would be activated against the prosecution in the event of suppression of material evidence.

In *Mahabir Singh v. Rohini Ramanadhwaj Prasad Singh* [1983] AIR PC 87, it was held that in order that the inference under s. 114, Illustration (g) may be raised, the Court must be satisfied that the evidence is in existence and can be proved. This is what Lord Thankerton said:

> It is right to refer to the absence of certain evidence, which the Subordinate Judge regarded as justifying inferences unfavourable to the respondent. As regards the horoscope and the books of account there seems little doubt that these existed, and that, if still available and produced, they would have been of importance as evidence. But the circumstances under which the Court would be entitled to draw inferences unfavourable to the respondent are provided for by s. 114(g), Evidence Act, and the Court must be satisfied that the evidence could be produced.

In *Jag Prasad Rai and Anor. v. Mt. Singari* [1925] AIR PC 93, Sir John Edge speaking for the Privy Council had this to say in regard to the non-production of the accounts of the alleged joint family:

> The books of account would have shown whether the accounts, which must have been kept, were the accounts of a joint family or of a partnership. The non-production of any of those books of account has not been satisfactorily explained by or on behalf of the plaintiffs, and their Lordships draw inference that if they were produced they would not support the case of the plaintiffs.

In *Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors.* [1968] AIR SC 1413, Ramaswami J. delivering the judgment of the Supreme Court had this to say about s. 114(g) of the Evidence Act:

> Even if the burden of proof does not lie on a party, the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

It must be stressed that where there is no evidence that the documents is not in the possession or power of the party withholding it, then the Court would refuse to raise an adverse inference against that party (*Devidas v. Surishailappa* [1961] SC 1277 (V 48 C 231)).

In *Mohd. Shafi & Anor. v. State of Jammu and Kashmir* [1970] AIR SC 688 (V 57 C 138), Bhargava J. in the course of his judgment had this to say:

> The very fact that a note regarding that file is contained on the copy of the letter leads to the inference that such a file at one time did exist. The non-production of that file, therefore, raises a strong presumption that, if produced, it would have supported the case of the detenu.

All the cases cited above show a singular trend: that adverse inference may be drawn from withholding material documents by a party in possession of them and that where the Crown withholds relevant documents in their possession, the Court must not hesitate to draw an inference adverse to it.

In the present appeal, the two tape recorders would surely shed light as to what actually transpired at the JPJ office and at the Court premises. The prosecution failed to explain completely as to why the two tape recorders were not produced bearing in mind that there was evidence that the complainant returned the two tape recorders to the BPR officers. In short, the two tape recorders were in the possession or power of the prosecution and they saw it fit to withhold it. It would not be incorrect to say that the contents of the two tape recorders could, of course, have been of vital importance because had it recorded the entire conversation between the first appellant and the complainant at the JPJ office and between the second appellant and the complainant at the Court premises, it would have been overwhelming corroboration of the complainant's version of the conversation given by both the accused persons.

On the basis of the stand I take in regard to the present appeal, I need not consider the other grounds which are inconsequential in nature. The conviction and sentence of both the appellants should be set aside and I so order, accordingly. The fines, if paid, are to be refunded.

Both the appellants suffered undue torment and mental anguish since 28 July 1987 and, in the circumstances, I do not propose to order a retrial. There will therefore be no order of a retrial.

NOOR JAHAN BT. ABDUL WAHAB

v.

MD. YUSOFF B. AMANSHAH & ANOR.

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[SUIT NO. 22-97-88]
3 JULY 1993

JURISDICTION: Property dispute between Muslim husband and wife - Wife claiming ownership of shares acquired during subsistence of marriage - Claim based on resulting trust - Whether action came within exclusive jurisdiction of the Syariah Court - Penang Administration of Muslim Law Enactment 1959 s. 40(3) - Federal Constitution Art. 121(1A).

LAW OF TRUST: Shares purchased by wife but registered in husband's name - Whether husband holding shares in trust - Whether shares a gift to husband - Whether presumption of resulting trust arose.

INTERPRETATION OF STATUTES: Section 40(3) Penang Administration of Muslim Law Enactment 1959 - Whether section restrictive in nature - Intention of the Legislature - Whether intention was to limit the jurisdiction of the Kathi Court - Long title to Enactment - Whether relevant to interpretation of Enactment.

INJUNCTION: Setting aside - Non-disclosure - Whether non-disclosure so severe as to call for discharge of injunction - Delay - Plaintiff waited for three years before applying for interim injunction - Whether delay sufficient ground for discharge.

The plaintiff claimed against the first defendant, her former husband, for a declaration that the first defendant was holding 47001 units of Amanah Saham shares in her trust, for the return of those shares and for continuation of an interlocutory injunction she had earlier obtained against the first defendant pertaining to the shares. The shares in question were issued by the second defendant, Amanah Saham Nasional Berhad.

It was not disputed that the plaintiff used her own money to purchase the shares but the facts showed that the entire shares had been registered in the name of the first defendant. The contention of the first defendant was that the shares were a birthday gift to him and therefore there was no question of any resulting trust or